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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NORTH CAROLINA;
E.W. JONES, COMMANDER, NORTH CAROLINA STATE HIGHWAY PATROL;
JAKE ALEXANDER, SECRETARY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS DEPART FROM THE STANDARD ESTABLISHED BY THIS COURT WHEN IT AFFIRMED THE DISTRICT COURT'S HOLDING THAT THE RESPONDENT HAD ESTABLISHED A PRIMA FACIE CASE OF SEX DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 WHERE THE ONLY EVIDENCE THAT THE PETITIONERS' MINIMUM HEIGHT REQUIREMENT HAD A DISPARATE IMPACT ON FEMALES WAS INFERRED BY THE USE OF GENERAL POPULATION AND CIVILIAN LABOR FORCE STATISTICS WHICH WERE NOT SHOWN TO REPRESENT PERSONS WHO WERE OTHERWISE QUALIFIED AND AVAILABLE FOR THE JOB?

II. DID THE COURT OF APPEALS DEPART FROM THE STANDARD ESTABLISHED BY THIS COURT WHEN IT AFFIRMED THE DISTRICT COURT'S RULING THAT THE PETITIONERS DID NOT REBUT THE RESPONDENT'S PRIMA FACIE SHOWING OF DISPARATE IMPACT DISCRIMINATION?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE AND FACTS 2

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 14

APPENDIX ..... A-1 thru A-19

TABLE OF AUTHORITIES

Page

CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975) 3, 7, 11

Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, (6th Cir. 1981) 12

Coe v. Yellow Freight Systems, Inc., 646 F.2d 444 (1981) 12

Contreras v. City of Los Angeles, 656 F.2d 1276 (9th Cir. 1981) 12

Dothard v. Rawlinson, 433 U.S. 321, 53 L.Ed.2d 786, 97 S.Ct. 2720 (1977) 8, 11

Griggs v. Duke Power Co., 401 U.S. 424, 28 L.Ed. 2d 158, 91 S.Ct. 849 (1971) 4, 7, 11

Hazelwood School District v. United States, 433 U.S. 299, 53 L.Ed.2d 768, 97 S.Ct. 2736 (1977). 8,9

International Brotherhood of Teamsters v. United States, 431 324, 52 L.Ed.2d 396, 97 S. Ct. 1843 (1977) 8, 9

Jackson v. Seaboard Coastline Railroad Co., 678 F.2d 992 (11th Cir. 1982) 12

Johnson v. Uncle Ben's Inc., 628 F.2d 419, (5th Cir. 1980), 567 F.2d 750 (5th Cir. 1981) 12

Metrocare v. Washington Metropolitan Area Transit Authority, 679 F.2d 925 (D.C. Cir. 1981) 12

NAACP v. Medical Center, Inc., 657 F.2d 1332 (3rd Cir. 1981) 12

New York City Transit Authority v. Beazer, 440 U.S. 568, 59 L.Ed.2d 587, 99 S.Ct. 1355 (1979) 8, 9, 11

Taylor v. Teletype Corp., 648 F.2d 1129 (8th Cir. 1981) 12

Teal v. State of Connecticut, 645 F.2d 133 (2nd Cir. 1981) 12

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 56 L.Ed.2d 207, 101 S.Ct. 1089 (1981) 11, 12, 14

Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982) 12

Washington v. Davis, 426 U.S. 229, 48 L.Ed. 2d 597, 96 S.Ct. 2040 (1976) 8

STATUTES

28 U.S.C. §1254 2

Title VII, 1964 Civil Rights Act ..... *passim*

42 U.S.C. §2000e-2 ..... 2, 3

REGULATIONS

29 C.F.R. 1600, et seq. (Uniform Guidelines on Employee Selection Procedures) 2, 13

29 C.F.R. 1607.6 13

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, State of North Carolina; E.W. Jones, formerly Commander; North Carolina State Highway Patrol; Jake Alexander, formerly Secretary, North Carolina Department of Transportation and Highway Safety, pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on May 19, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit will not be published and is set forth in the Appendix at pages A-11 — A-12. The opinion of the District Court is reported at 512 F.Supp. 968 and is set forth in the Appendix at pages A-2 through A-8.

JURISDICTION

The court of appeals' Jugment was entered May 19, 1982. The petitioners moved for an enlargement of time in which to petition for rehearing until June 7, 1982. The motion for enlargement of time was granted and the petitioners thereafter filed a timely petition for rehearing on June 7, 1982. The petition for rehearing was denied on June 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). (Appendix p 14).

STATUTES AND REGULATIONS INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq. and 29 C.F.R. 1600 et. seq. (Uniform Guidelines on Employee Selection Procedures).

STATEMENT OF THE CASE AND FACTS

On October 23, 1975, The United States (hereinafter respondent) filed a complaint in the United States District Court for the Eastern District of North Carolina, against the State of North Carolina, the Commander of the North Carolina State Highway Patrol and the Secretary of the North Carolina Department of Transportation and Highway Safety, (hereinafter petitioners). The respondent alleged the named petitioners had pursued and were pursuing practices which discriminated against blacks and women with

respect to employment opportunities in the North Carolina State Highway Patrol and that such acts and practices constituted a pattern and practice of resistance to the full employment rights secured by Title VII of the Civil Rights Act of 1964, as amended, the fourteenth amendment, and 42 U.S.C. §2000e-6(b) [§707(b) of the Civil Rights Act of 1964] and 28 U.S.C. §1345. A consent decree was entered on December 16, 1980, wherein the parties resolved all issues raised by the litigation except the validity of the North Carolina State Highway Patrol's 5'6" minimum height requirement for State troopers.

The respondent contended the minimum height requirement unlawfully discriminated against women. The petitioners contended the requirement was necessary for the safe and efficient performance of the job of trooper and thus job related. Following a two-day trial in February 1981, the district court found the petitioners' minimum height requirement had a substantial adverse impact on women, and that the petitioners had not established the requirement was job related. The court ruled from the bench on February 12, 1981 that the North Carolina State Highway Patrol's height requirement violated Title VII, and enjoined its further use. Judgment was entered the same day.

Subsequently, the district court prepared a written memorandum of opinion which is published at 512 F.Supp. 968. (Appendix pp A-2 - A-8). In the published opinion, the district court states that the respondent's evidence had established a prima facie case of discrimination under the standard established in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). This finding was based upon respondent's evidence in the form of general population statistics from the 1970 U.S. Census, which showed that the 5'6" height requirement

eliminated vastly more women ages 18-34 than men from consideration for employment as a North Carolina State Highway Patrol trooper. The district court next found that the petitioners had not presented sufficient evidence to rebut the inference of discrimination raised by respondent's prima facie case under the standard anounced in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In doing so the district court rejected the results of an empirical study offered by the petitioners and supportive expert testimony which concluded that their minimum height requirment was necessary for the safe and efficient performance of the job of North Carolina State Highway patrol trooper. Specifically, the evidence showed that because shorter troopers were more likely to be assaulted than taller troopers, the petitioners and their employees would suffer economic and psychological harm if the minimum height requirement was eliminated. The district court rejected the study and expert testimony finding:

> For a number of reasons, which go not only to the scope and methodology but also to the materiality of the study, ... it provides no evidence whatever that the height requirement is job related.

(Appendix p A-4).

The district court also rejected opinion testimony of troopers that height or stature was an advantage in job performance because:

> Such subjective evaluations have invariably been found inadequate to establish the job relatedness of physical requirements for law enforcement jobs.

(Appendix p A-6).

Petitioners filed a notice of appeal from the district court's judgment on March 19, 1981. Along with the notice of appeal, the petitioners filed a motion for stay pending appeal. The district court denied the motion for stay on April 1, 1981 and petitioners subsequently filed a similar motion with the United States Court of Appeals for the Fourth Circuit. That motion for stay was denied on June 1, 1981. Thereafter, the petitioners applied to this Court for a stay pending appeal. This Court denied the petitioners' motion on June 29, 1981.

The case was heard in the United States Court of Appeals for the Fourth Circuit on August 4, 1981 and decided on May 19, 1982. The court of appeals affirmed the judgment of the district court "On the basis of *United States v. Commonwealth of Virginia*, 620 F.2d 1018 (4th Cir. 1980) ... because North Carolina ' . . . did not demonstrate the need for . . . [the] physical requirement [. . .]' ". (Appendix p A-12).

The petitioners' petition for rehearing, filed on July 7, 1982, was denied by the court of appeals on June 29, 1982.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT COURT OF APPEALS DEPARTED FROM THE STANDARD ESTABLISHED BY THIS COURT WHEN IT AFFIRMED THE DISTRICT COURT'S RULING THAT THE RESPONDENT HAD, BY USE OF GENERAL POPULATION AND CIVILIAN LABOR FORCE STATISTICS ALONE, WHICH WERE NOT SHOWN TO REPRESENT PERSONS OTHERWISE QUALIFIED AND AVAILABLE FOR THE JOB, ESTABLISHED A TITLE VII PRIMA FACIE CASE OF DISPARATE IMPACT DISCRIMINATION.

The respondent presented no witnesses at trial in support of its prima facie case but merely relied upon stipulations by the petitioners and certain exhibits to establish the inference of unlawful discrimination. In the stipulations the petitioners admitted they imposed a 5'6" minimum height requirement on applicants for the position of North Carolina State Highway Patrol trooper; that only 0.5% of the persons hired as troopers between 1972 and 1980 were female; that according to the 1970 Census females comprised 50.0% of the population of the State of North Carolina between the ages of 20 and 34 (a category which roughly parallels the petitioners' minimum and maximum ages for initial employment); and that according to the 1970 Census, females comprised 41.3% of the civilian labor force of the State of North Carolina. Among the exhibits introduced by the respondent, one established that approximately 77.3% of the females in the United States' population between the ages of 18 and 34 were under 5'6" tall while approximately 9.4% of the males in the same age category were under 5'6" tall.

The petitioners challenged the sufficiency and accuracy of the respondent's statistically-based prima facie case by a motion to dismiss at the close of respondent's evidence. The motion was denied. In its memorandum of opinion the trial court explains its ruling as follows:

> The court has no difficulty in finding that the 5'6" height requirement has a substantial adverse impact on women. It operates so as to automatically eliminate 77.3% of women between the ages of 18 and 34 from consideration for employment as a highway trooper, as opposed to only 9.4% of men.

(Appendix p A-3).

The inescapable conclusion drawn from this statement is that the district court based its ruling that the respondent had established a prima facie case of discrimination solely on the statistical evidence before it. Specifically, the court found the petitioners' minimum height requirement to be discriminatory because fewer women than men in the nation's general population were 5'6" or more tall.

The question of whether general population and civilian labor force statistics which are not shown to represent persons who are otherwise qualified and available for the job are sufficient as a matter of law to establish a prima facie case of discrimination under the disparate impact theory was fully briefed and argued by the petitioners' in the court of appeals. However, the court of appeals, in affirming the ruling of the district court, made only a passing reference to this important question.

> The district court held invalid the 5'6" minimum height requirement for employment of the North Carolina Highway Patrol, essentially because the Highway Patrol had not presented any job analysis of the dozens or hundreds of different tasks performed by the Patrol and of the ability of people under 5'6" to perform them, *this case and the holding of the district court being based on the fact that many fewer women than men are 5'6" tall.*

(Appendix p A-12, emphasis added).

This court has established that a prima facie case of disparate impact discrimination may be inferred by the use of statistical data. *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975); *Griggs v. Duke Power Co.,* 41 U.S. 424 (1971). The court has further established that generalized national statistics can, in an appropriate

case, infer that a facially neutral hiring standard, such as a height requirement, acts to select applicants for hire in a discriminatory pattern. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). However, the court has consistently cautioned that generalized statistics have little probative value in a discrimination case unless they accurately reflect the defendant's pool of qualified applicants. *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979); *Dothard v. Rawlinson, supra; Hazelwood School District v. United States*, 433 U.S. 229 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

The caution with which the court accepts generalized statistics is well-founded. Obviously, the effect an employment standard is perceived to have on a class of persons protected by Title VII depends entirely upon the figures to which an employee's hiring rate and work force composition are compared.

In this case the percentage of females hired by the petitioners and the percentage of females in their work force were compared to the percentage of females in the State's general population and its work force. The inference the courts below drew from this comparison and the respondent's statistical showing that fewer women in the national population than men were 5'6" or taller was that the petitioners' minimum height requirement was the cause of the disparity. However, the respondent's generalized state statistics did not take into consideration what percentage of the females in the state's population or labor force were both available and otherwise qualified for the job

offered by the petitioners. Both of these factors have been recognized as crucially important in defining the appropriate applicant pool to which an employer's hiring rate or work force composition is to be compared for the purpose of determining whether an employment standard causes disparate impact.

New York City Transit Authority v. Beazer, supra; Hazelwood School District v. United States, supra, at 307 n. 13. Because the respondent's generalized statistics did not take these factors into consideration, they cannot be said to represent the petitioners' relevant applicant pool. Thus, the inference of discriminatory disparate impact drawn from the comparison between those figures and the petitioners' hiring rate and work force composition has little if any probative value. The courts below erred in not requiring the respondent to show that the pool to which the petitioners' hiring rate and work force were compared consisted of people who were otherwise qualified and available for the job.

This deviation from the standards established by this court is even more glaring when considered along with the fact that the respondent presented no other evidence of discrimination by the petitioners. The function of statistical evidence in a disparate impact analysis is to create an inference that an employer's practice has an unlawful discriminatory effect on a class protected by Title VII. The usefulness of such an inference depends upon all of the surrounding circumstances. *International Brotherhood of Teamsters v. United States, supra.*

It is true that several courts of appeals have rejected defendants' arguments that statistical evidence alone cannot form the basis of a prima facie case. However, in most of those cases the plaintiff's prima facie case has

relied upon specific, relevant statistical evidence. In no case has a court of appeals held that general statistics could establish a prima facie case in the absence of some other evidence of discrimination by the defendants.

In all disparate impact cases in which this court has accepted the use of generalized statistics to establish a prima facie case of discrimination there also has been some other evidence to bolster the inference established by the statistics. In the case at bar, however, there was nothing to compliment or reinforce that inference. Thus, the initially weak inference established by the respondent's generalized statistical evidence that the petitioners' hiring practice was unlawful becomes even weaker.

This court and several courts of appeals have recognized that it is much easier to prevail on a discrimination claim under Title VII using the disparate impact theory than the disparate treatment theory. However, this Court should not allow a court of appeals to further lessen the plaintiff's burden to establish a prima facie case by condoning a method of proof in which only generalized statistics are used.

There is obviously a need for this Court to settle the question of whether a prima facie case of disparate impact discrimination can be established by the use of generalized statistics alone. A definitive statement from this Court on the accepted methods of proving disparate impact under Title VII would be of great benefit to employers, applicants for jobs and those agencies tasked with enforcing the law. This Court is now presented with a case which allows it to render an opinion on that narrow issue alone. The question is one of sufficient substance and importance to warrant review by this Court.

II. THE FOURTH CIRCUIT COURT OF APPEALS DEPARTED FROM THE STANDARD ESTABLISHED BY THIS COURT WHEN IT AFFIRMED THE DISTRICT COURT'S RULING THAT THE PETITIONERS DID NOT REBUT THE RESPONDENT'S PRIMA FACIE SHOWING OF DISPARATE IMPACT.

Over the years this Court has devised a general framework for allocating proof in a Title VII disparate impact case dealing with hiring practices. First, the plaintiff must carry the initial burden of establishing a prima facie case. He does this by establishing that an employer's hiring practice has a disparate impact on a group protected by Title VII. *Griggs v. Duke Power Co., supra.* If the plaintiff carries this burden, the employer may meet it by showing that his employment practice is necessary to safe and efficient job performance, *Dothard v. Rawlinson, supra,* at 331 n. 14, or that it is job related, *New York City Transit Authority v. Beazer, supra; Griggs v. Duke Power Co., supra.* Finally, where the employer meets this burden, he will prevail unless the plaintiff shows that there are alternative procedures which serve the employer's legitimate needs while creating a lesser discriminatory impact on the protected class. *Albemarle Paper Co. v. Moody, supra.*

The courts of appeals all followed this Court's direction and place the ultimate burden of persuasion in disparate impact cases upon the plaintiff. However, a conflict has developed among the courts of appeals as to what burden the defendant must assume in step two of the disparate impact theory allocation of proof. The conflict is over whether the employer bears the burden of persuasion or the burden of proof.

The issue has become even more confused since this Court's decision in *Texas Department of Community*

Affairs v. Burdine, 450 U.S. 248 (1981). In that case the Court held that a defendant in a disparate treatment case could rebut a plaintiff's prima facie showing of discrimination simply by articulating some legitimate nondiscriminatory reason for its employment action. However, the courts of appeals have reached conflicting opinions as to whether the rule announced in *Texas Department of Community Affairs v. Burdine, supra*, is also to be applied to a defendant's burden in a disparate impact case.

It appears that the second, fifth, eighth, tenth and eleventh circuits have limited the decision in *Texas Department of Community Affairs v. Burdine, supra*, to cases tried under the disparate treatment theory. *Teal v. State of Connecticut*, 645 F.2d 133 (2nd Cir. 1981); *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750 (5th Cir. 1981); *Taylor v. Teletype Corp.*, 648 F.2d 1129 (8th Cir. 1981); *Coe v. Yellow Freight Systems, Inc.*, 646 F.2d 444 (10th Cir. 1981); *Jackson v. Seaboard Coastline Railroad Co.*, 678 F.2d 992 (11th Cir. 1982). However, the third, sixth, ninth and District of Columbia circuits have either specifically decided or implied that the *Burdine* rule is applicable in disparate impact cases as well as disparate treatment cases. *NAACP v. Medical Center Inc.*, 657 F.2d 1332 (3rd Cir. 1981); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251 (6th Cir. 1981); *Contreras v. City of Los Angeles*, 656 F.2d 1276 (9th Cir. 1981); *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982); *Metrocare v. Washington Metropolitan Area Transit Authority*, 679 F.2d 925 (D.C. Cir. 1981). Thus, those circuits require that the defendant in a disparate impact case only articulate some legitimate nondiscriminatory reason for its employment practice in order to show its job relatedness.

The case at bar gives the Court the opportunity to address this issue specifically. The petitioners rebutted the respondent's prima facie case with both an empirical study and opinion testimony from employees which supported the position that the petitioners' minimum height standard was necessary to the safe and efficient operation of their business. The empirical study was rejected by the courts below for a number of reasons including the "methodology" used. (Appendix p A-3 - A-4). There can be no doubt that this reference is reflective of the courts' opinion that any empirical study as to the business necessity or job relatedness of the petitioners' minimum height requirement had to be conducted in strict compliance with the standards of test validation set out in the *Uniform Guidelines Employee Selection Procedures*, 29 C.F.R. 1600, et. seq. It is the court's further opinion that the study failed to meet those standards. Even if the Court's opinion that a nontest employment standard has to be validated pursuant to the Guidelines is correct, which the petitioners deny on the basis of 29 C.F.R. 1607.6 (Appendix p A-19), the empirical study along with the supportive expert and opinion testimony from employees is certainly an articulation of some legitimate nondiscriminatory reason for their hiring practice. Thus, if the petitioners' contention that the *Burdine* standard applies in disparate impact cases is correct, the court below erred in finding the petitioners had not rebutted the respondent's prima facie case. The conflict among the courts of appeals as to the proper burden to place upon a defendant who attempts to rebut a prima facie case of disparate impact is likely to continue without a definitive statement by this Court. This is a question of sufficient importance and substance to warrant review by this Court.

CONCLUSION

Clearly, therefore, the apparent conflict of the decision of the court of appeals with this Court's previous decisions, the unclear, confusing and conflicting interpretations by the courts of appeals of *Texas Department of Community Affairs v. Burdine, supra,* and the compelling policy considerations directed to establishing clearer guidelines for all litigants in present and future Title VII disparate impact cases combine to present questions of sufficient substance and importance to warrant review by this Court. Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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